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IN THE

Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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February 20, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Eastern Air Lines, Inc. (Eastern), respectfully submits this petition for writ of certiorari to review the judgment (R. 94) of the United States Court of Appeals for the District of Columbia Circuit entered and filed in that court on October 23, 1950, and confirmed upon denial (R. 125) of petition for rehearing on November 22, 1950, in the case of *Eastern Air Lines, Inc. v. Civil Aeronautics Board,* No. 10,264, 185 F. (2d) 426 (App. D. C. 1950).

The Court of Appeals has affirmed the orders of the Civil Aeronautics Board (R. 85, 88) granting to Capital Airlines,

Inc. (Capital) an exemption under Section 416 (b) of the Civil Aeronautics Act of 1938, as amended (the Act), permitting that carrier to serve Baltimore and omit service to Pittsburgh on all-cargo schedules operated with C-54 aircraft which serve New York and points west of Baltimore on Capital's Route 14; and the Court of Appeals has held that the Board acted properly in granting such exemption without making findings and without granting Eastern a hearing despite Eastern's seasonable and repeated request therefor.

Statement of the Case

Eastern is engaged in interstate transportation of persons, cargo and mail pursuant to certificates of public convenience and necessity issued by the Board, among which are certificates authorizing service between New York/Newark (hereinafter referred to as New York) and Baltimore, and between those cities and Akron, Cleveland, Detroit and Chicago (all of the latter cities being points on Capital's Route 14 west of Baltimore).

Capital is engaged in interstate transportation of persons, cargo and mail pursuant to certificates of public convenience and necessity issued by the Board, among which are certificates authorizing Capital to provide service between Norfolk and Chicago via Washington, Baltimore, Pittsburgh, Akron, Cleveland, Detroit and other intermediate points (Route 14), between New York and New Orleans via Pittsburgh and other intermediate points (Route 55), and between Washington and Memphis via various Virginia, North Carolina and Tennessee cities (Route 51). Such certificates contain no authorization for Capital to serve Baltimore on any flight between New York and points on Route 14 west of Baltimore (see map opposite this page).

Capital filed an application (R. 20) for exemption under Section 416 (b) of the Act to permit Capital to serve Baltimore and not to serve Pittsburgh "as an intermediate

CAPITAL AIRLINES ROUTES 14, 51 AND 55 AND NEW ALL-CARGO OPERATIONS PERMITTED BY EXEMPTION

point on Capital's C-54 all-cargo flights which serve New York/Newark as a coterminal." The application contained various allegations designed to support Capital's request, such as the alleged need of Baltimore for improved all-cargo service, the alleged inability of Capital to provide such improved service except pursuant to the requested exemption, and the economies which allegedly would result from operation under the requested exemption.

Eastern, which has certificate authorization to provide passenger, cargo and mail service between New York and Baltimore and between both of those cities and numerous points on Capital's routes, including points west of Baltimore on Capital's Route 14, filed an opposition (R. 26) to Capital's exemption application because of the competitive implications of Capital's proposal. It disputed all of Capital's factual allegations and urged that the Board summarily deny Capital's application or, in the alternative, that "Capital's application be set down for hearing" (R. 37-38). Other documents were filed by Capital and Eastern (R. 38, 42) disputing each other's contentions.

The Board granted the requested exemption (R. 85-87) without hearing (with a restriction against carrying New York-Baltimore local traffic). The order granting the exemption recited the allegations of Capital without finding whether such allegations were true or not; mentioned the fact that Eastern had filed an opposition, denying Capital's allegations, but did not recite any of Eastern's contentions or make any finding as to the accuracy of such contentions; and made the following so-called "findings": "That the present enforcement of the provisions of Section 401 (a) of the Act insofar as said section would otherwise prevent applicant from engaging in air transportation authorized hereby would be an undue burden on applicant by reason of the unusual circumstances affecting its operations and is not in the public interest."

Eastern filed a petition for reconsideration (R. 46), pointing out the following among other facts:

(a) That the Board had made no finding that any of Capital's representations was true (R. 50);

(b) That the Board made no finding such as is required by law (R. 61-66);

(c) That there was no evidence at all, much less substantial evidence, on which the Board could predicate a finding or order as required by law (R. 66-68);

(d) That the Board had improperly denied Eastern's request for a hearing, such hearing being required by the Act and principles of due process (R. 66-68);

(e) That the Board did not purport to take "official notice" of any facts, and could not lawfully have done so without giving Eastern an opportunity to controvert such facts (R. 67-68);

(f) That numerous factual allegations made by Capital are untrue (R. 50-57);

(g) That the Act and the Board's established policies thereunder require denial of Capital's application for exemption, even if Capital's allegations were accepted as true (R. 57-60);

(h) That the exemption would permit Capital to divert substantial revenues from Eastern and therefore the Board's order should be stayed (R. 68-69).

Eastern and Capital filed additional documents (R. 69, 72, 75) disputing each other's contentions.

The Board, again without hearing, issued a new order (R. 88) "finding" (1) that there was an "ambiguity" in the previous order "which might lead to the interpretation" that Capital could operate all-cargo service between New York and points south of Washington on Routes 51 and 55, and (2) that Eastern's petition for reconsideration and

other subsequent documents "do not warrant the relief requested except to the extent granted herein" (clarification of the "ambiguity"); amending the exemption to limit Capital's New York-Baltimore operations to flights originating or terminating at points west of Baltimore on Capital's Route 14; and denying Eastern's petition for reconsideration.

Eastern filed a petition for judicial review (R. 1) in the United States Court of Appeals for the District of Columbia Circuit. That Court's decision (R. 93) affirmed the orders of the Board on the grounds that (1) the statute authorizes "the Board to grant, without hearing, exemptions from requirements that do not relate to pilots," and (2) the statutory requirement that the Board grant exemptions only "if it finds" that the statutory criteria have been met means "little more than 'if it believes' " that the statutory standards permit such action.

Eastern's petition for rehearing (R. 95-124) was denied (R. 125).

Jurisdiction

The Court of Appeals had jurisdiction pursuant to Section 1006 (a) of the Act (49 U.S.C. 646 (a)) and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009). This Court has jurisdiction under Section 1006 (f) of the Act (49 U.S.C. 646 (f)) and 28 U.S.C. 1257.

The Questions Presented

The questions which this Court is requested to decide are:

(1) Whether the Board may lawfully grant an air carrier, by exemption, new route authority which duplicates existing certificate authority of other carriers, without granting a hearing to a carrier adversely affected by such exemption authority, if hearing is seasonably requested; and (2) whether, even assuming that the Board

may, without hearing, grant competitive new route authority by exemption, the Board may lawfully ignore the statutory requirement that exemptions be granted only after making findings as to "public interest" and as to "undue burden" on the carrier requesting the exemption.

Reasons For Allowance of Writ of Certiorari

(A) ***The decision of the Court of Appeals involves questions of general importance and the construction of United States statutes (the Civil Aeronautics Act and the Administrative Procedure Act) which have not been, but should be, settled by the Supreme Court.***

The decision of the Court of Appeals makes, in substance, the following holdings which Eastern earnestly believes to be erroneous:

(1) That the Board has two alternative methods of granting new route franchises or authority— (a) it may follow the detailed procedure outlined in the Act and grant a certificate of public convenience and necessity *after notice and hearing and after making findings,* or (b) it may ignore such procedure completely and grant *the same authority,* by exemption, *without notice, hearing, or findings* (even though, in so doing, it seriously impairs or destroys other carriers' certificate rights which were obtained after the full hearing required by the Act and which were accepted by such carriers on the assurance of the Act that competition would not be authorized except in accordance with notice, hearing and findings based on the statutory standards)—and that the Board apparently may employ either method in its absolute and unlimited discretion; and

(2) That the Board may grant exemptions "from nearly all requirements of the Act" (R. 92) without making any findings (although Section 416 (b) (1) of the Act permits the Board to grant exemptions only "if it finds" that certain conditions exist) "if it believes" that the required

conditions exist and if such "belief" is "supported" by *ex parte* allegations of the applicant for exemption.

The decision of the Court of Appeals would lead to complete frustration of the basic purposes of the Act. The Board itself has held (*Re Large Irregular Carriers*, Docket 3945, May 25, 1950, pages 2-3, 4-5, 19) that:

(a) " . . . the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of the unrestricted and cutthroat competition which had brought the industry to its unhappy condition";

(b) "The keystone of the system there set forth is the requirement, in section 401 (a), that no carrier shall engage in air transportation unless there is in force a certificate of public convenience and necessity authorizing such transportation . . . ";

(c) " . . . the issuance of a certificate of public convenience and necessity is, and must be, the principal means of authorizing air transportation and . . . the power to grant such authority through exemption is sharply restricted and is to be employed only in the extraordinary case"; and

(d) The questions presented by applications for new route authority by exemption "raise difficult and complex issues which can be satisfactorily determined only after full hearing upon applications for certificates of public convenience and necessity."

The legislative history of the Act makes quite clear that Congress intended that new route matters be determined only after "full and complete hearings" (83 Cong. Rec. 6852).

Having established elaborate substantive and procedural safeguards to prevent authorization of wasteful competi-

tion (such safeguards including detailed statutory standards of public convenience and necessity and public interest (Section 2) and the requirement of a certificate of public convenience and necessity to be granted only after notice, hearing and findings, plus available judicial review), can it be supposed that Congress intended by Section 416 (b) (1) of the Act to permit the Board to abandon all such safeguards and, on the basis of the Board's own whimsy or "belief" unsupported by evidence or findings, to authorize unlimited competition by orders which, because of their lack of such support, could not be reviewed by any court and would not even apprise the interested parties of the reasons for the Board's action?

The lower court's decision, attributing to Congress an intent to establish such a self-destructive legislative program, seems plainly untenable. Numerous statutory indicia of Congressional intention to require hearings and findings based on evidence in exemption cases involving new route authority are discussed in the brief attached to this petition. In summary, those indicia include the following facts:

(1) As indicated above, the purpose of the Act is to establish "security of route"—a purpose which could not be achieved if the Board were enabled to disregard statutory standards and procedure and act on the basis of its unsupported "belief."

(2) Section 416 (b) (1) of the Act permits the Board to grant exemptions only "if it *finds* that enforcement of this title . . . would be an undue burden . . . and is not in the public interest"; Section 1005 (f) requires that "*Every order* [including exemption orders] of the Authority shall set forth the *findings of fact* upon which it is based"; Section 1006 (a) provides for judicial review of "*Any order,* affirmative or negative"; and Section 1006 (e) provides that "The *findings of facts* by the Authority, *if supported by substantial evidence,* shall be conclusive"

(Italics supplied)—all clearly demonstrating the intention of Congress that hearings be held in exemption cases in order that the required "findings" may be made and based on the "substantial evidence" which is necessary in order for exemption orders to be sustained on judicial review.

(3) The statutory provision for judicial review of "any order," even if standing alone, would compel the conclusion that a hearing must be had, for a court plainly cannot review an administrative decision based on "information secretly collected" or on facts which are "unknown and unknowable." *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 302-303 (1937).

(4) The detailed legislative standards for Board action set forth in Section 2 of the Act, and made applicable to exemptions in Section 416 (b) (1), clearly require the exhaustive factual analysis which can be made only after full hearing. *Trans-Pacific Airlines v. Hawaiian Airlines*, 174 F. (2d) 63, 65 (C.C.A. 9th, 1949); *Re Large Irregular Carriers, supra*, page 19.

(5) Section 1005 (a) of the Act specifically authorizes the Board, *in emergencies* (there being no emergency or claim of emergency in this case), to act in exemption and other cases on the basis of "opinion" (*i.e.* "belief") and "without notice, hearing, or the making or filing of a report"—a clear indication that Congress meant the Board to have no such arbitrary power except under emergency conditions, and then only with the safeguard that the Board shall "immediately initiate proceedings" to test the validity of the emergency action.

(6) If the Board were deemed to have the power to grant new route authority on the basis of a mere "belief," and without findings or evidence to explain or support such action, the statutory justification for such unlimited discretion would amount to an unconstitutional delegation of legislative power. *Panama Refining Co. v. Ryan*, 293 U.S.

388 (1935); *Schechter Poultry Corporation v. United States*, 295 U.S. 495, 537, 538, 551, 553 (1935).

(7) Certificated air carriers have a "conditionally exclusive" right created by their certificates—a right which may not, under the express provisions of Section 401 (h) of the Act, be amended or modified without notice and hearing; and the authorization by the Board of a competitive service which reduces or limits the effective market of a certificated carrier is an amendment or modification of its certificate. *Federal Communications Commission v. National Broadcasting Co.*, 319 U.S. 239 (1943).

(8) The "conditionally exclusive" property right of an air carrier in its certificate may not constitutionally be destroyed or impaired without notice and hearing. *Frost v. Corporation Commission*, 278 U.S. 515 (1929).

The foregoing factors clearly indicate that a hearing and findings based on evidence are required by the Act in exemption cases involving new route authority, such as that involved in this case.

(B) *The decision of the Court of Appeals with respect to applicability of the Administrative Procedure Act is in conflict with the decision of the Supreme Court in Wong Yang Sung v. McGrath, 339 U. S. 33 (1950).*

The Court of Appeals has held that the hearing requirements of the Administrative Procedure Act (such requirements being imposed with respect to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"—Section 5) are not applicable to exemption proceedings such as this, apparently for the sole reason that Section 416 (b) (1) of the Civil Aeronautics Act does not specifically require a hearing (although it does require the Board to make findings which must be supported by "substantial evidence") whereas other portions of the Act specify hearings.

That ruling of the lower court is inconsistent with the decision of the Supreme Court in *Wong Yang Sung v. McGrath*, where this Court held that the hearing requirements of the Administrative Procedure Act were applicable even though the statute there involved did not specifically, or even impliedly, call for a hearing. This Court stated (339 U.S. 41) that "it would be a disservice to our form of government and to the administrative process itself if the court should fail, so far as the terms of the Act [Administrative Procedure Act] warrant, to give effect to its remedial purposes where the evils it was aimed at appear." The Court found that a hearing was required, despite the absence of a statutory provision therefor, because the constitutional right of liberty was at stake, and that therefore the Administrative Procedure Act applied as fully as if the hearing were specifically "required by statute."

Here, as demonstrated above, a hearing is required because the constitutional right of property is involved. But, in addition, the plain statutory indicia discussed above demonstrate that a hearing is "required by statute" within the meaning of Section 5 of the Administrative Procedure Act. If, as this Court held in the *Wong Yang Sung* case, a constitutional implication of hearing is the equivalent of a hearing "required by statute," then surely a hearing implied from clear indications within the statute itself (particularly when supported by the constitutional necessity for a hearing in order to protect property rights in a certificate of public convenience and necessity) is a hearing "required by statute." In an article entitled "Three Years of the Federal Administrative Procedure Act—A Study in Legislation" (1950) 38 Geo. L. J. 579-581, Senator Pat McCarran, who is generally regarded as being the author of both the Civil Aeronautics Act and the Administrative Procedure Act, referred to the Supreme Court's decision in the *Wong Yang Sung* case holding "the Administrative Procedure Act applicable even in those cases in which the hearing requirement 'has been read into a statute . . . in

order to save the statute from invalidity'," and stated as follows:

> "*A fortiori*, it would seem, the Act will apply where statutes do not use the magic word 'hearing' but refer to 'evidence,' or 'record' or some other equally plain indicia of a hearing. Moreover, those indicia need not indicate a need for both 'hearing' and 'decision on the record thereof.' In other words, the Administrative Procedure Act has survived academic and hair-splitting theories as to the source and statutory specification of hearing requirements."

The decision of the Court of Appeals conflicts (1) with the spirit of the *Wong Yang Sung* decision to the effect that the hearing requirements of the Administrative Procedure Act must be enforced by the courts "so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear"; (2) with the holding in the *Wong Yang Sung* case that a hearing requirement implied from the due process provisions of the Constitution is sufficient to invoke the Administrative Procedure Act; and (3) with the "*a fortiori*" result proceeding from the *Wong Yang Sung* decision that "plain indicia of a hearing" (such as the requirement in this case of "findings," which must be supported by "substantial evidence") will make the Administrative Procedure Act applicable.

(C) *The decision of the Court of Appeals has so far sanctioned departure by the Board from the accepted and usual course of judicial or quasijudicial proceedings as to call for an exercise of the Supreme Court's power of supervision.*

As pointed out in some detail above, and as will be explained more fully in the brief attached to this petition, the decision of the Court of Appeals erroneously sanctions Board procedure whereby the Board may by-pass all of the substantive and procedural safeguards established by Congress in the Act to prevent establishment of uneconomic

and wasteful air transportation services and to protect from unwarranted competition carriers which have obtained certificates of public convenience and necessity on the basis of the hearings, substantial evidence and findings required by the Act. Moreover, although the Board's action in granting new route authorization by exemption is unquestionably "adjudication," by definition in the Administrative Procedure Act (Section 2 (d)), the decision of the lower court has approved adjudicatory procedure by the Board which furnishes no opportunity for hearing, which may rely entirely on *ex parte* representations by the applicant for new authority, and which makes no findings to apprise the parties or a reviewing court of the reason for the Board's action, and which, according to the lower court, may be based entirely on a "belief" which the Board has formulated without reference to anything which could be called evidence.

It is clear that the Board procedure which the decision of the Court of Appeals has approved is a most radical and dangerous departure from the accepted and usual course of judicial and quasijudicial proceedings, and the supervision of the Supreme Court plainly is required in order to correct the errors of the Board and the lower court.

CONCLUSION

From the foregoing, it is apparent that the questions raised by the decision of the Court of Appeals are of general importance, relating to the construction and application of statutes of the United States, and that such questions have not been, and should be, settled by the Supreme Court. It is further clear that there is a conflict between the decision of the lower court and the decision of the Supreme Court in the *Wong Yang Sung* case, and that such conflict should be resolved by the Supreme Court. Moreover, the decision of the lower court sanctions Board procedure which is so far removed from the accepted and

usual course of quasijudicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The Decision Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit supporting the judgment with respect to which review is sought here is reported in 185 F. (2d) 426, and is set forth in full in the printed record (R. 90-93).

The Court of Appeals affirmed orders of the Civil Aeronautics Board (the Board) granting to Capital Airlines, Inc. (Capital) an exemption under Section 416 (b) (1) of the Civil Aeronautics Act (the Act) whereby, despite the contrary requirements of Capital's certificates of public convenience and necessity, Capital was permitted to operate C-54 all-cargo flights between New York and points west

on its Route 14 via Baltimore, subject to a restriction against carrying local New York-Baltimore traffic (see map opposite page 2 of the attached petition).

The decision of the Court of Appeals is that, even though the Act requires the Board to make findings before granting exemptions, and even though all orders of the Board are subject to judicial review and may be sustained only if the Board's findings are supported by "substantial evidence," the Board may grant new route authority in the form of exemptions without hearing and without findings—the requirement of "findings" being construed by the Court of Appeals to call for only a "belief" on the part of the Board "supported" by *ex parte* representations of the applicant for exemption.

Grounds for Writ of Certiorari

The grounds for seeking writ of certiorari are set forth in the annexed petition.

Statutory Provisions

The applicable statutory provisions are quoted in the appendix to this petition and brief.

Statement of the Case

The facts material to the questions presented by the petition for writ of certiorari are set forth in full in the annexed petition, and will not be repeated here.

Errors to be Urged

It is urged that the Court of Appeals erred in holding (1) that,—despite the fundamental purpose of the Act and clear indicia in the Act to the contrary, and despite serious constitutional questions raised by such holding,—no hearing is required prior to the granting by the Board of new route authority by exemption even though the certificate

rights of other carriers may be impaired by such exemption authority, and (2) that no findings by the Board are necessary if the Board has a "belief," which is "supported" only by *ex parte* representations of the applicant for exemption, that the exemption may properly be granted.

Summary of Argument

The annexed petition for certiorari contains, under the caption "Reasons for Allowance of Writ of Certiorari," a reasonably concise summary of the arguments to be advanced by Eastern Air Lines, Inc. (Eastern) in this brief, and such summary will not be repeated here.

ARGUMENT

I.

The Orders of the Board here Complained of Are Contrary to Law Because the Board Denied Eastern a Hearing With Respect to the Proposed Exemption

The principal question involved in this case is whether the Board has power under the Act and the Constitution of the United States to grant to Capital, pursuant to the exemption provisions of the Act (Section 416 (b) (1)), new route authority adversely affecting the certificated routes of other carriers, including Eastern, without holding a hearing requested by an affected carrier.

Stated differently, the question is whether the Board might lawfully subject Eastern and other carriers, in defense of their certificated routes, to a "trial by correspondence," in which the Board purports to determine facts and law on the basis of mere allegations made by each party and disputed by the other, unsupported by evidence, and in which both parties are deprived of the right to cross-examine each other's witnesses under oath and submit detailed data not available in public files or other recognized authoritative sources.

A. *If Competitive New Route Authority By Exemption Could Be Granted Without Hearing, The Basic Purpose of the Act Would Be Defeated.*

It is universally recognized that the primary purpose of the Act is to create safeguards against wasteful and destructive competition, and that the requirement of a certificate of public convenience and necessity is the keystone of the statutory plan to effectuate that purpose.

The Board itself has recognized this fact (*Re Large Ir-*

regular Carriers, Docket 3945 *et al.*, page 3) in making the following statements with respect to the Act:

> "Its legislative history makes quite clear that the primary objectives of the economic regulatory powers vested in the Board were the establishment of security of route as a basis for sound and orderly development and the elimination of the unrestricted and cut-throat competition which had brought the industry to its unhappy condition.
>
> "These economic powers are described in Title IV of the Act. The keystone of the system there set forth is the requirement, in section 401 (a), that no carrier shall engage in air transportation unless there is in force a certificate of public convenience and necessity authorizing such transportation."

Title IV sets out in considerable detail the methods whereby the air transport industry and the public are to be protected against uneconomic competition and other improper practices. A certificate of public convenience and necessity is required; it may be granted only after application, notice, hearing and findings; it is subject to terms and conditions found to be in the public interest; and it may be amended, suspended, revoked or abandoned only after notice, hearing and findings (Section 401 (a), (b), (c), (d), (f), (g), (h), and (k)). Detailed standards are set up with respect to carriage of the mail (Section 401 (m) and (n) and Section 405), the filing and observance of tariffs (Section 403), the establishment of just and reasonable rates and services (Section 404), the establishment of mail rates (Section 406), the keeping of records (Section 407), the establishment of intercarrier agreements and relationships (Sections 408, 409 and 412), the supervision of government financial aid for carriers (Section 410), protection against unfair competition (Section 411), and investigations into air carrier management (Section 415).

The lower court's opinion states, in effect, that Congress, after specifying in great detail the duties of the Board and

of air carriers, and the manner of performance of such duties, provided at the very end of that specification a complete "escape clause," giving the Board power to ignore the entire statutory scheme, relieve itself and air carriers of the duties imposed by the Act, and accomplish all this without notice, hearing, findings, evidence or any of the other protective measures provided in the Act.

It is impossible to believe that Congress would authorize the Board to abandon the entire statutory program of economic regulation without any standards by which such action might be tested (see discussion of the question of delegation of legislative power in Section II of this brief). It is especially clear that Congress did not leave the "keystone of the system" (the certificate of public convenience and necessity) as completely within the uncontrolled discretion of the Board as the lower court's opinion holds. It is not reasonable to suppose that Congress would set up an elaborate procedure for granting new route authority only after notice, hearing, argument and findings and then say to the Board:

"You may use this procedure or not, as you choose; and if you prefer not to have a hearing, then you may just grant an exemption to accomplish precisely the same thing without a hearing."

Congress cannot be presumed to have created two such completely inconsistent ways of doing the same thing. Why did Congress establish a very careful pattern for regulatory control if it meant in the end to authorize the Board to act arbitrarily and without standards and without making findings based on evidence?

The lower court's reasoning appears to be based on two erroneous premises: (1) that the requirement of a hearing in exemption cases would minimize the Board's exemption power; and (2) that the specific requirement of a hearing in other sections of the Act indicates that the lack of such

specification in Section 416 (b) (1) was deliberate. The second premise will be discussed in some detail in subsection B of part I of this brief, demonstrating that the requirement of "findings" in Section 416 (b) (1) was intended by Congress to call for a hearing.

The lower court's first premise amounts to a contention that, in order to "preserve" the exemption power of the Board in its most extreme form (*i.e.*, a completely arbitrary power to exempt from all economic regulation, and without hearing or other protection for the public or other carriers) the Board should be authorized to disregard the entire statutory scheme. Surely the basic purpose of Congress in passing the Civil Aeronautics Act should be given greater weight than is given to the purely incidental purpose of permitting exemptions in cases of extreme hardship. The rule is far more important than the exception to it. To "preserve" the exemption power in extreme form while destroying the Act is like eviscerating the patient while attempting to save his toe. If the choice were presented, it seems clear that the toe should be sacrificed rather than the body. Here, however, both can and should be preserved.

The lower court's conclusion that hearings and findings are not required is the result of following superficial logic to an absurd end. Congress *specifically* required the Board to make findings before granting exemptions. Surely, in view of that requirement, it would be absurd to suppose that Congress meant, merely by omitting a specific requirement of a hearing, that the Board should be authorized to evade "nearly all requirements of the Act" (R. 92) without giving anyone notice, hearing, a statement of findings, or any opportunity to obtain effective judicial review.

An even further absurdity is this: that, according to the lower court's opinion, the *only* provision of Title IV of the Act from which the Board *cannot* grant an exemption without a hearing is Section 401 (l), which has to do with wages

and hours of pilots. Surely it cannot be supposed that Congress was more concerned about protecting pilots from adverse changes in wages or hours than in protecting the air transport industry as a whole from destructive and generally uneconomic conditions and protecting the public from violations of the anti-trust laws, discriminations against communities and classes of traffic, etc. Any such supposition would be directly contrary to the announced primary purpose of the Act, as pointed out hereinabove, to provide for "the establishment of security of route as a basis for sound and orderly development." There are sufficient clear indications in Section 416 (b) (1) and elsewhere in the Act to establish that Congress had no intention of setting up a statutory pattern primarily for the benefit of pilots and designed to leave the protection and regulation of the industry as a whole and the advancement of the public interest to the uncontrolled discretion of the Board.

The lower court's apparent belief that the requirement of a hearing in exemption cases would partially nullify the exemption power seems to assume that the basic purpose of Section 416 (b) (1) was to exempt from *hearing*. Such was not the purpose. At the time the Act was passed, Senator Truman stated (83 Cong. Rec. 6726) the purpose to be "to enable the Authority to adjust some of the requirements of the law where necessary to encourage small operators, such as the small operators in Alaska, in cases of hardship."

Note that the word is "adjust," not "disregard." The obvious purpose was to enable the Board to relieve carriers from some of the substantive provisions of the Act which might be an "undue burden," such as requirements for detailed reports, for notice of proposed changes in tariffs and schedules, for keeping accounts in a particular form, etc. There are many possible exemptions as to which no one would request or desire hearing, and presumably

as to most of those the Board could grant exemptions without hearing, treating the right to hearing as having been waived. It is submitted that the Congressional purpose was that, "in cases of undue burden," the Board might relieve the *carrier* from the *substantive requirements of the Act*, but Congress surely did not mean to relieve *the Board* from the duty of making the determinations and findings required by the Act.

It should be noted that Section 401 (c) of the Act states that "*the Authority* shall give due notice" of applications and such applications "shall be set for public hearing" (Italics supplied). It is clear that the duty of giving notice and holding a hearing is the duty of *the Board*, not of the applicant. Surely Congress did not intend to give the Board power to exempt *itself* from its statutory duties.

The Board itself has recognized that Section 416(b) "contemplates only a power to relieve an air carrier from the necessity of conforming to those requirements of the Title which are subject to enforcement by the Board in the ordinary sense, rather than from a statutory condition attached to the right to obtain a franchise." *Alaska Air Transp. Investigation*, 2 C.A.B. 785, 793 (1941). Notice and hearing are "statutory conditions" to the right to a franchise under Section 401.

The exemption power of the Board is most extensive, and will not be "nullified" or substantially limited, even though hearings are required in some instances. Even the power to exempt, after hearing, from the certificate provisions is very sweeping in character, as such an exemption presumably relieves the carrier from the obligations attached to a certificate—including the duty to provide adequate transportation (Section 404 (a)), the requirement of carrying mail in accordance with regulations of the Postmaster General (Section 405 (g)), etc. Certainly such relief should not be granted without hearing where an af-

fected carrier, the Postmaster General, or other representative of the public desires to be heard.

Far from nullifying the exemption power, the requirement of hearing in cases such as this will preserve that power in the form intended by Congress, providing necessary protection to the industry and the public while permitting relief where it is properly established that an "undue burden" would otherwise exist.

B. *Clear Statutory Indicia Establish that a Hearing is Required Before Granting of New Route Authority By Exemption.*

Aside from the fact, demonstrated above, that the basic purpose of the Act—protection of the public and the air transport industry—is inconsistent with the unrestrained power of exemption, without hearing, findings or evidence, which the lower court's decision would grant to the Board, there are clear indications in the statutory language that a hearing is required before the granting of new route authority by exemption. Among other indicia are the following:

Section 416 (b) (1) of the Act authorizes the Board to grant an exemption to an air carrier only "if it *finds* that the enforcement of this title . . . would be an undue burden on such carrier . . . by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier . . . and is not in the public interest" (Italics supplied).

Section 1005 (f) of the Act requires that "*Every order* of the Authority shall set forth the *findings of fact* upon which it is based" (Italics supplied).

Section 1006 (a) provides for judicial review of "*Any order*, affirmative or negative, issued by the Authority under this Act . . ." (Italics supplied).

Section 1006 (e) of the Act provides that, upon judicial

review of the Board's orders, "The *findings of facts* by the Authority, if supported by *substantial evidence*, shall be conclusive" (Italics supplied).

Section 10 of the Administrative Procedure Act likewise provides for judicial review of orders of the Board, and requires the reviewing court to set aside any action of the Board found to be "unsupported by substantial evidence."

The foregoing statutory provisions demonstrate that (1) the Board is required to make findings of fact in support of an exemption order, (2) findings of fact must be supported by "substantial evidence", and (3) if the reviewing court can find in the record on appeal no "substantial evidence" which justifies the action of the Board, the exemption order must be set aside.

It should be immediately apparent from a casual study of the facts of this case that there is and could be no evidence of any kind in support of the Board's orders. The record consists entirely of the *allegations* of Capital and the *counter-allegations* of Eastern, together with the Board's orders. Certainly there is nothing in such material which could be called "evidence", much less "substantial evidence".

It is axiomatic that evidence cannot be obtained except through some form of hearing. It is true that Section 7 (d) of the Administrative Procedure Act permits official notice by the agency with respect to facts which are a matter of common knowledge or may otherwise be accepted as authoritative without proof. However, even in the case of official notice, the Board would be required under Section 7 (d) of the Administrative Procedure Act to afford Eastern "an opportunity to show the contrary", which of course amounts to a hearing with respect to matters so noticed.

Eastern repeatedly demanded a hearing, and pointed out that there were no facts of record or facts which could

be officially noticed by the Board which would support the Board's conclusion, and that the only way that any such facts could be developed would be through a hearing.

Not only is it necessary to have some form of hearing in order to obtain "evidence", but it is obvious that a finding cannot be made (as required by the Act) except on evidence obtained at a hearing.

As was stated in *California Employment Commission* v. *Malm*, 59 Cal. App. (2d) 322, 138 P. (2d) 744, 746 (1943), with respect to the word "finding":

> "Where the word is used in a statute conferring quasi-judicial functions upon an administrative body it implies that the body has conducted some sort of a hearing, or investigation of the facts, upon which it may reach the conclusion that these facts are true."

Likewise, in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 91 (1913), the Court stated:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' [citing cases] or if the facts found do not, as a matter of law, support the order made" (citing cases).

The requirements with respect to hearing, findings and evidence, as established in judicial decisions, have been strengthened and confirmed by Congress in the Administrative Procedure Act, Section 5 of which provides as follows:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with certain exceptions not here pertinent]—

"(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8."

It will be noted that Section 5 applies only where a "case of adjudication" is "required by statute to be determined on the record after opportunity for an agency hearing." Clearly the instant case is one of "adjudication" (Administrative Procedure Act, Section 2 (d) and (e)). Likewise it is clear that the Civil Aeronautics Act requires a hearing, since the Board is required to make findings, which findings must be based on evidence, and the Board's orders are subject to reversal by the court if unsupported by "substantial evidence". It might be noted further that, if it were to be concluded that the statute does not require a hearing before the Board, Eastern would nevertheless be entitled to a hearing—in the form of a *de novo* trial in court. This appears from the following statements made by the sponsors of the Administrative Procedure Act:

Senate Judiciary Committee (Senate Document 248, 79th Cong., 2d Sess., p. 22):

"There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo*, of the facts in all cases of adjudications where statutes do not require an administrative hearing."

Senate and House Committees (Senate Document 248, pp. 214, 279):

"The sixth category [Section 10 (e) (6)], respecting the establishment of facts upon trial *de novo*, would

require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8."

Thus it will be seen that the sponsors of the Administrative Procedure Act contemplated that a party would be entitled to a trial *de novo* in any case of adjudication (such as this clearly is) where the statute did not require a hearing before the agency.

See also the Attorney General's Manual on the Administrative Procedure Act (1947) at pp. 109-110.

It would be absurd to suggest that the statute does not require a hearing in this case and that therefore Eastern is remitted to a trial *de novo* in court. Such a suggestion would be contrary to the entire pattern of the Civil Aeronautics Act, which plainly requires findings by the Board and review of such findings by the court.

The statutory provision (Section 1006 (a) of the Act) that "Any order * * * shall be subject to review by the circuit courts of appeals", and the provision (Section 1006 (e) of the Act) that "The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive", furnish indisputable proof that the statute requires a hearing with respect to exemption orders of the type here involved. How could the court review the Board's order and determine if the findings were supported by "substantial evidence" unless there had been a hearing in which had been submitted something the court could recognize as evidence? Clearly the court cannot review the undisclosed mental processes of the Board members, and the court cannot treat the unsupported allegations and counter allegations of Capital and Eastern as evidence.

That a hearing is a prerequisite to judicial review is well illustrated by the Supreme Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-303 (1937), where the Court noted that the administrative

agency had based its decision on "information secretly collected" without hearing or opportunity to the parties to rebut or cross-examine. With respect to such procedure, Mr. Justice Cardozo stated for the Court:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."
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> * * * * *
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> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

That reasoning is equally applicable here. While the Board has stated certain conclusions as to Capital's exemption application, there is no way for the court to ascertain what facts, if any, the Board considered in reaching its decision. The only way in which the court could effectively review the Board's orders would be to require

a full hearing before the Board in which evidence may be presented.

Again in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad, supra,* the Court stated (227 U. S. at 91) that "A finding without evidence is arbitrary and baseless," and (227 U. S. at 92) that "A finding without evidence is beyond the power of the Commission," and (227 U. S. at 93) "manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." The Court further stated (227 U. S. at 93):

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. Interstate Commerce Commission v. Baltimore, &c. R. R., 226 U. S. 14, 57 L. ed. ——, 33 Sup. Ct. Rep. 5."

In *United States* v. *Abilene & S. Ry.*, 265 U. S. 274, 288 (1924), Mr. Justice Brandeis, speaking for the Court, stated as follows: "But a finding without evidence is beyond the power of the Commission. Papers in the Commis-

sion's files are not always evidence in a case. *New England Divisions Case*, 261 U. S. 184, 198, note 19, 43 Sup. Ct. 270, 67 L. Ed. 605. Nothing can be treated as evidence which is not introduced as such." See also *The Chicago Junction Case*, 264 U. S. 258, 263 (1924).

It follows inevitably that the statutory provision for judicial review of the Board's orders requires that the Board hold a hearing in exemption cases such as this in which "substantial evidence" supporting the Board's ultimate order may be presented and fully tested by cross-examination. Any other interpretation of the Act would render the judicial review provision a nullity. See also *American Eagle Fire Ins. Co.* v. *Jordan*, 67 F. Supp. 76, 82 (D.D.C. 1946).

A brief examination of the Board's duties in passing on an application for exemption under Section 416 of the Act will demonstrate the absolute necessity of a hearing. As the court pointed out in the case of *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F. (2d) 63, 65 (C. C. A. 9th, 1949):

> "It is immediately discovered that any consideration of the scope of the exemption required a detailed examination of the economic situation of Trans-Pacific and of the public policy involved.
>
> "The Board is given power to issue a certificate of public necessity and convenience, which will give a carrier a right to engage in air transportation, §401 (a). The Board is given power to exempt from the requirement of this title or any provision thereof or any rule, regulation, term, condition or limitation prescribed thereunder, any air carrier or class of air carriers. The exercise of this latter power is conditioned upon a finding by the Board 'that the enforcement of this title' or 'such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers.' Not only that, but the Board must find this 'undue burden' occurs 'by reason of the limited extent

of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest' §416 (b) (1).

"In the light of these statutory provisions the function of the Board was legislative or administrative. The Board, whether it dealt with a single air carrier or a class of air carriers, was concerned with the economic condition thereof and practices and activities in the future. No exemption could be granted, limited, or complete without performance of this condition precedent."

Not only must the Board make "a detailed examination of the economic situation" of Capital before it can grant an exemption, but it must also find that the exemption would be "in the public interest." The Act contains a definition of "public interest" (Section 2) which requires the Board to determine whether the proposed exemption would (a) encourage and develop an air transportation system properly adapted to the needs of the Nation; (b) recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in air transportation, and improve the relations between, and coordinate transportation by, air carriers; (c) promote adequate, economical and efficient service at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; (d) create competition to the extent necessary to assure sound development of an adequate air transportation system; (e) promote development and safety of air commerce; and (f) encourage and develop civil aeronautics.

Obviously, the Board could not perform its statutory functions in ruling on the application for exemption without making a detailed study of Capital's operations and economic condition, and the operations and condition of other carriers which might be affected by Capital's proposed exemption, and the many public interest factors

prescribed in the statute—and such a study could not properly be made without a hearing. The necessity for full study and application of the statutory standards is emphasized by the Supreme Court in *United States* v. *Carolina Carriers Corporation*, 315 U. S. 475, 489 (1942).

The lower court's opinion asserts that hearing in exemption cases is not required by the Administrative Procedure Act, and assumes that, because Congress did not specifically provide for a hearing in Section 416 (b) (1), no such hearing is "required by statute" within the meaning of Section 5 of the Administrative Procedure Act. A eloquent rebuttal of that assumption is the following quotation from an article ("Three Years of the Federal Administrative Procedure Act—A Study in Legislation" (1950) 38 Geo. L. J. 579-581) written by Senator Pat McCarran, who is generally regarded as being the author of *both* the Civil Aeronautics Act and the Administrative Procedure Act:

> "Shortly after the adoption of the Act [Administrative Procedure Act] it came to be widely assumed among agencies that, unless the statute authorizing an administrative function *expressly* required a hearing, the Administrative Procedure Act did not apply. Some went further and assumed that sections 5, 7, and 8 of the Act did not apply unless there was express statutory requirement not only of a 'hearing' but of decision 'on the record' as well. Still another form of contention was that, although hearings might be required by 'law' in the sense that constitutional requisites could not be met without a hearing at the administrative level, such situations were to be distinguished from those in which statutes themselves plainly stated the hearing prerequisite.
>
> "But all of these arguments were simply forms of words whereby it was sought to distinguish between statutory hearings and hearings supposedly otherwise somehow required by law. Of course Congress not only made no such distinction in the Administrative Procedure Act, but had no reason to do so. It was also a piece of hypertechnical legalism to so attempt

to distinguish between 'express' and 'implied' statutory requirements, to say nothing of statutory language between those extremes. More plausible was the notion that there could be "constitutional" hearings as distinguished from statutory ones except that in our system the prescription of methods of administration—whether by formal hearings or summary 'non-hearing' procedures—is traditionally the function of Congress. Generally speaking the Constitution forbids; it does not prescribe what statutes omit. Unfortunately the art of legislative drafting is not so precise that the words 'hearing' or 'record' are always used even where Congress intends to require them and, knowing that, Congress would not assume to distinguish hearing functions on the grounds suggested. Nevertheless for three years the issue was whether Congress did just that in prescribing the applicability of the Administrative Procedure Act's important provisions.

"In the main the lower federal courts adopted these administrative views in a variety of situations. On February 20 last, however, the Supreme Court set the issue at rest on broad grounds in the *Sung* case where it held the Administrative Procedure Act applicable even in those cases in which the hearing requirement 'has been read into a statute . . . in order to save the statute from invalidity.' *A fortiori*, it would seem, the Act will apply where statutes do not use the magic word 'hearing' but refer to 'evidence', or 'record' or some other equally plain indicia of a hearing. Moreover, those indicia need not indicate a need for both 'hearing' and decision 'on the record thereof'. In other words, the Administrative Procedure Act has survived academic and hair-splitting theories as to the source and statutory specification of hearing requirements."

The "*Sung* case" referred to by Senator McCarran is *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), in which the Supreme Court pointed out that "it would be a disservice to our form of government and to the administrative process itself if the court should fail, so far as the terms of the Act warrant, to give effect to its remedial

purposes where the evils it was aimed at appear." It is evident from Senator McCarran's article that one of the "evils" at which the Administrative Procedure Act was aimed was just such arbitrary action as the Board has taken in this case without notice or hearing. Congress obviously intended that no technical interpretation should be placed on the absence of the "magic word 'hearing' " from the statute, and the requirements that the Board may act only "if it finds" certain things, that its findings must be supported by "substantial evidence" and that the Board's orders in exemption cases are subject to judicial review constitute "plain indicia of a hearing" which, in the language of Senator McCarran, lead *"a fortiori"* to the conclusion that the Administrative Procedure Act will apply.

Senator McCarran's present views with respect to the need for hearing are exactly the same as those which he expressed to the Senate at the time the Civil Aeronautics Act was being passed. As author and sponsor of that legislation, Senator McCarran stated (83 Cong. Rec. 6852):

> "If it could be established to the satisfaction of the Authority which is about to be set up that another line could well be operated from Chicago to Salt Lake City, although that same territory is now served by the United Air Lines, and the demand for service was so great as to support another line, then the Authority could investigate, reach a determination, establish a rule, and could say, 'There is sufficient demand, there is sufficient patronage, and there is sufficient commercial life to sustain the other lines. Therefore, we can grant a franchise to another line.' *But before that could be done, full and complete hearings would have to be had"* (Italics added).

It should be noted that at the time Senator McCarran stated that "full and complete hearings would have to be had," Section 416 (b) (1) was in the proposed bill in substantially its present form (83 Cong. Rec. 6756). The lower court's conclusion that the Board has the power

to establish a Chicago-Salt Lake City route by exemption without full hearing is directly contrary to the understanding which Congress had of the legislation at the time it was passed.

The lower court's opinion states (R. 92) that, because Section 416 (b) (2) of the Act—relating to pilots' pay—specifically requires a hearing while Section 416 (b) (1) specifies only that the Board make findings, "Congress could hardly have made clearer its intention to authorize the Board to grant, without hearing, exemptions from requirements that do not relate to pilots." As pointed out above, it is impossible to believe that Congress was so much concerned about pilots and so little concerned about the general public and the entire air transportation industry that it required due process protection only for the pilots and authorized the Board to act without hearing or other safeguards in creating unlimited competition, permitting unrestricted violation of the anti-trust laws, giving unlimited subsidy to airlines, etc. But if such had been the intention of Congress, it certainly could have made its purpose much clearer. It could have omitted the requirement of "findings"; it could have specifically authorized the Board to act on the basis of "belief" or "opinion"; and it could have said in so many words that the Board might act "without hearing."

Congress has demonstrated clearly in the Act that it knows how to authorize the Board to act without hearing. Section 1005 (a) of the Act provides that: . . . "whenever the Authority is of the *opinion* that an *emergency* requiring immediate action exists in respect of safety in air commerce, the Authority is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or *without notice, hearing, or the making or filing of a report,* to make such just and reasonable orders, rules, or regulations, as

may be essential in the interest of safety in air commerce to meet such emergency; *Provided further,* That the Authority shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this Act."

If Congress had intended to give the Board power to grant exemptions without notice, hearing or findings, why did it not express itself plainly in Section 416 (b) (1) as it did in Section 1005 (a)? The plain fact is that Congress did not mean to have the Board act in that fashion *except in emergency,* and then Congress very carefully provided that the Board must give *prompt* opportunity for affected parties to test such action in a regular proceeding. It should be emphasized that Section 1005 (a) relates to *all* functions of the Board, *including the granting of exemptions.* When that provision is read with Section 416 (b) (1), it is entirely clear that, in the normal situation (such as that presented in this case) where there is no emergency, the Board is not authorized to act without notice, hearing, findings, or on the basis of a mere "opinion" or "belief." See *Standard Airlines* v. *Civil Aeronautics Board,* 177 F. (2d) 18, 21 (App. D. C., 1949).

A further provision of the Act which requires that a hearing be afforded before competitive new route authority may be granted by exemption is Section 401 (h), which provides that the Board may "alter, amend, modify, or suspend" a certificate of public convenience and necessity only *"after notice and hearing."* In *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U. S. 239, 244-245 (1943) the Supreme Court held that the granting of a competing radio license has such an adverse effect on the original exclusive license as to amount to a "modification" thereof. The same is true in the case of air carrier route authorizations. While it was electrical interference which was involved in the *National Broadcasting Co.* case,

the only *effect* of such interference was to deprive the first licensee of part of its former audience and business—just as the authorization of a competitive air carrier deprives the original carrier of its former traffic. The fact that a different form of interference is involved does not change the basic principle.

It follows that the granting to Capital of new route authorization by exemption, which diminished the effective market of other carriers and reduced the value of their certificate rights, amounted to an amendment or modification of the affected certificates, and notice and hearing were therefore required under Section 401 (h) of the Act.

C. *The Constitutional Principles of Due Process Require that Eastern Be Given a Hearing Before Its Certificate Property Right Is Impaired.*

The lower court's opinion recognizes that, under the decision of the Supreme Court in *Wong Yang Sung* v. *McGrath, supra,* Eastern is entitled to a hearing under the Administrative Procedure Act if the Constitution requires a hearing, even though the Civil Aeronautics Act does not specifically mention "hearing" as a requirement in exemption proceedings of this type. However, that opinion characterizes Eastern's complaint as being solely against "damage by competition which it says was made possible by unauthorized administrative action," and the lower court concludes that "The Constitution does not guarantee protection against such damage." In support of that proposition the lower court cites *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938) and *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118 (1939).

Eastern's complaint cannot be so easily disposed of. It is well settled that a certificate of public convenience and necessity (a franchise), such as Eastern's, is a "property interest" entitled to protection against impairment by arbitrary action. The Board itself has held such certificates to be "property" having substantial value. *Acquisition*

of Mayflower Airlines, Inc., by Northeast Airlines, Inc., 4 C.A.B. 680, 684 (1944); *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C.A.B. 409, 413 (1940); and *United Air Lines, Inc.—Western Air Lines, Inc., Acquisition of Air Carrier Property*, 8 C.A.B. 298, 311-316 (1947). The courts have reached the same conclusion. Thus, in *New York Electric Lines* v. *Empire City Subway*, 235 U. S. 179, 193 (1914), the Court held that a franchise is "property" which is "made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated." Likewise in *Frost* v. *Corporation Commission*, 278 U. S. 515, 519-520 (1929) the Court held that a license granted to a cotton ginning company was "property" because (1) the statute declared such a company to be a public utility, (2) any such company was required to obtain a permit to do business, (3) such companies were regulated the same as transportation companies, and (4) a permit to engage in the business was denied in any case where there was "no public necessity for it." *Cf. Standard Airlines* v. *Civil Aeronautics Board, supra*, 177 F. (2d) 20.

In the *Frost* case the Court went further and held—directly in point here—that where a license is granted under a statutory provision requiring proof of public necessity, that license cannot lawfully be impaired by the grant of a competitive license *without notice and hearing*, and a specific statutory authorization for such a grant without hearing is unconstitutional. The Court stated as follows (278 U. S. 521): "While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal opera-

tion upon the ground that such operation is an injurious invasion of his property rights."

Here precisely the same reasoning applies. Eastern has received certificates of public convenience and necessity pursuant to a statute which requires notice and hearing before competitive certificates can be granted, which prohibits the authorization of competition except "to the extent necessary" to attain the announced statutory purposes, and which requires the Board to achieve and maintain "sound economic conditions" in the air transport industry. Thus, Eastern has a property right which, though not exclusive, is protected against excessive competition and competition not found, after hearing, to be required by the public convenience and necessity. In other words, Eastern has a "conditionally exclusive" certificate which cannot be impaired except by following the procedure and standards outlined in the Act. Thus Eastern is not complaining against mere competition, but rather competition in excess of statutory requirements and competition authorized without the hearing and findings required by law, which competition would impair Eastern's conditionally exclusive property right. The decisions cited by the lower court make precisely this distinction. In the *Alabama Power Company* case, the Supreme Court emphasized that the franchises of the power companies were neither conditionally nor absolutely exclusive and that the proposed competition was fully authorized by law, and the Court carefully distinguished the *Frost* case on that ground. The *Tennessee Power Company* case likewise shows that the proposed competition was fully authorized under the statutes involved.

It is not clear why the lower court cited the *Alabama Power Company* and the *Tennessee Power Company* cases, inasmuch as those cases held that the power companies had no *"standing"* to question the acts there complained of, whereas here the lower court concedes (R. 91) that Eastern

has " 'a substantial interest in such order' within the meaning of the section of the Act that permits judicial review." Any suggestion that competitive impact on a certificated carrier is insufficient to give "standing" for judicial relief would be contrary to all decided cases on the point, including *Pan American Airways v. Civil Aeronautics Board*, 121 F. (2d) 810, 813 (C.C.A. 2d, 1941) where the court stated: "Pan American, as the only American carrier engaged in foreign air transportation, had a substantial interest in the issue of a certificate because it would be adversely affected by the diversion of traffic to a prospective competitor."

It may well be that Eastern's right to judicial review is sufficient alone to establish Eastern's "property right" under the Constitution, as anything short of a property interest could hardly qualify as a "substantial interest" within the meaning of the review provisions of the Act. But, in any event, the foregoing authorities establish that Eastern has a Constitutionally-protected property interest herein, which entitles Eastern to a hearing before such right may be impaired as contemplated by the Board's orders here under consideration.

The lower court's assertion (R. 92-93) that the proceedings before the Board (consisting entirely of disputed *allegations* of the interested parties) were sufficient apparently is predicated on the assumption that *no proceedings* were required. It is inconceivable that an agency may rely on mere *allegations* where they are directly disputed and where, as here, the facts are such as cannot be ascertained fully except through cross-examination of the applicant. Certainly a court would not act on the basis of such self-serving statements by the interested party where counter-allegations have been filed, and it is submitted that the Board cannot do so, particularly since the Board's orders must have sufficient evidentiary basis to be sustained on review by the court.

It is well settled that reliance on such *ex parte* allega-

tions is not in accordance with due process. *Londoner v. Denver*, 210 U. S. 373, 386 (1908). And even if *part* of the material facts relied on in issuing an administrative order is presented *ex parte* (*i.e.*, is not subjected to cross-examination), the requirements of due process have not been met. *Reilly v. Pinkus*, 338 U. S. 269, 275-276 (1949).

It is respectfully submitted that Eastern has a constitutional right to a hearing before the Board in this case, and this Court is urged to require the Board to hold such a hearing.

II.

The Orders of the Board here Complained of Are Contrary to Law Because they Fail to Set Forth the Findings of Fact Upon Which They Are Based.

As demonstrated above, Section 416 (b) (1) of the Act authorizes the Board to grant exemptions only "if it finds" that enforcement of the law would be "an undue burden" and "not in the public interest," and Section 1005 (f) requires that "Every order of the Authority shall set forth the findings of fact upon which it is based." Similar provisions are found in Sections 6 (d) and 8 (b) of the Administrative Procedure Act.

It is perfectly clear that the Board did not comply with any of the above-cited statutory provisions in issuing the orders here complained of. As noted above, the Board's order of September 27, 1948, initially granting the exemption merely recited (R. 85-86) various representations made by Capital, without purporting to find whether such representations were true or false, and further recited (R. 86) the fact that Eastern had filed a motion to dismiss, without even attempting to state what allegations were made in that motion. The Board then proceeded to "find" (R. 86) simply that "the present enforcement of the provisions of section 401 (a) of the Act insofar as said sections would

otherwise prevent applicant from engaging in the air transportation authorized hereby would be an undue burden on applicant by reason of the unusual circumstances affecting its operations and is not in the public interest."

It will be seen that the Board's only "finding" is stated in almost exactly the language of the statute, and makes no attempt to set forth any of the facts or supposed facts which led to the Board's conclusion.

Again, in denying Eastern's petition for reconsideration, the Board simply recited (R. 88) its previous actions, the fact that Eastern had filed a petition requesting reconsideration, the fact that Capital had filed an answer and that Eastern had filed a reply, and the conclusion of the Board that "an ambiguity" in the original order should be clarified, and the Board then "found" (R. 89) that "the matters set forth in the aforementioned petition, motion, and letters of Eastern do not warrant the relief requested except to the extent that such relief is granted herein" (the "relief" granted being the clarification of the "ambiguity"). Obviously that "finding" is simply a statement of a conclusion, without any attempt to state what facts led the Board to reach that conclusion or why the numerous facts set forth in Eastern's petition for reconsideration, the supplement to that petition, and the letters filed in connection therewith, did not require a different conclusion.

Numerous decisions of the Supreme Court and other courts establish that such findings are not sufficient. *Florida v. United States*, 282 U. S. 194 (1931); *Panama Refining Company v. Ryan*, 293 U. S. 388 (1935); *United States v. Chicago, M., St. P. & P. R. R.*, 294 U. S. 499 (1935); *United States v. Carolina Carriers Corporation*, 315 U. S. 475 (1942); *Securities & Exchange Commission v. Chenery Corporation*, 318 U. S. 80 (1943), 332 U. S. 194 (1947); *Saginaw Broadcasting Company v. Federal Communications Commission*, 68 App. D. C. 382, 96 F. (2d) 554 (1938); *Inland*

Motor Freight v. United States, 60 F. Supp. 520 (E. D. Wash. 1945).

Congress has made it clear that the requirement of findings in the Administrative Procedure Act is not satisfied by a mere recitation of the statutory language. As Congressman Walter, the principal sponsor of the Administrative Procedure Act in the House of Representatives, said (Senate Document 248, p. 367):

> "*The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section* unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined" (Italics supplied).

The Senate and House Committee Reports on the Administrative Procedure Act stated (Senate Document 248, pp. 210, 273):

> "The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis."

The Supreme Court had the following to say in *United States v. Carolina Carriers Corporation*, 315 U. S. 475, 489 (1942):

> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an addi-

tional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed these statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then the review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain."

Even if, as the lower court held, there were no requirement of a hearing in exemption proceedings such as this, the Board would not therefore be relieved of its duty to make findings. Not only does the Civil Aeronautics Act *specifically* require findings in exemption cases, but Section 6 (d) of the Administrative Procedure Act — applicable to *all* proceedings, *whether hearings are granted or not* — requires that "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

With respect to Section 6 (d) of the Administrative Procedure Act the Senate and House Committees stated as follows (Senate Document 248, pp. 206, 265-268):

"This subsection affords the parties in any agency proceeding, whether or not formal or upon hearing, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefor. The latter should in any case be sufficient to apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have."

It follows that, even if the Board could deny Eastern a hearing with respect to Capital's application for exemption, the Board was required — under the Administrative Procedure Act and the Civil Aeronautics Act — to give Eastern a statement which would explain the basis for the Board's action in denying Eastern's objection to the exemption. Plainly the Board's "parroting of . . . conclusions in the words of statutes" was not sufficient.

The lower court attempts to excuse the Board's failure to make findings by saying that "The statutory words 'if it finds,' in their context, mean little more than 'if it believes.'" That is judicial legislation in its most obvious form. When Congress plainly requires "findings," how can a court say that Congress meant to require only a "belief"! Particularly, how can a court reach such a conclusion when Congress has used the words "if it finds" in Section 416 (b) (1) (the exemption section) and also in other contexts (Sections 401 (d) (1), 401 (k), 408 (b), 412 (b), 416 (b) (2), and 1002 (c)) where genuine findings (and hearing) clearly are required, and has used the words "whenever the Authority is of the opinion" in other portions of the Act (Sections 1005 (a) and 1002 (a)) where it appears that the Board may lawfully act on the basis of "belief" or "opinion"!

Congress must be presumed to know the difference between a finding and a belief or opinion, and to have made a deliberate choice of words in requiring that the Board make findings before granting exemptions.

As demonstrated above, it is inconceivable that Congress intended to turn over to the Board complete discretion to by-pass the standards and requirements of the Act simply on the basis of a "belief" of the Board that such action is desirable. Such a supposed intention is contrary to the entire pattern and purpose of the Act.

It is obvious that a "belief" of the Board could not be

reviewed by a court. If the Board were to act on a "belief," an appellate court would be confronted with the problem stated by Mr. Justice Cardozo in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302-303 (1937):

> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

Thus, the existence of the judicial review provision negatives the suggestion that the Board may act on a "belief" unsupported by findings or evidence.

The very importance of the Board's functions conclusively demonstrates that Congress could not have meant to allow the Board to act on mere "belief." Can it be that the Board, acting on a mere "belief," could exempt a carrier from the requirement of having a hearing as required by Section 401 and forthwith grant to the carrier a certificate of public convenience and necessity? Could the Board, acting on "belief," exempt a carrier from the requirement of a hearing and forthwith allow it to abandon service without giving interested cities an opportunity to protest? Could the Board, acting on "belief," exempt a carrier from filing tariffs, observing tariffs, filing divisions of rates, giving non-discriminatory service to localities and types of traffic, providing safe and adequate service, providing facilities to carry the mail, seeking approval of merger agreements, acquisitions of control, pooling agreements, etc.? Could the Board, acting on "belief," exempt carriers (and itself) from the provisions of Section 406 of the Act, and set any rate it wished for the carriage of mail without any opportunity for the Post Office Department to be heard on the question?

Could the Board, acting on "belief," exempt a car-

rier from the necessity of filing an application for overseas or foreign air transportation, forthwith grant to such carrier an exemption the equivalent of a certificate of public convenience and necessity, and thus deprive the President of his power to approve or disapprove the granting or denial of "any certificate authorizing an air carrier to engage in overseas or foreign air transportation" under Section 801 of the Act?

Surely Congress did not mean that the regulatory program could thus be destroyed by Section 416 (b) (1). On the contrary, Congress specifically required that the Board make findings which, in turn, must be based on substantial evidence.

A recent much-publicized proceeding before the Board may serve to illustrate in part the danger inherent in the court's decision. Pan American World Airways, Inc. and American Airlines, Inc. filed an application for approval of the acquisition by Pan American of American's subsidiary, American Overseas Airlines, Inc. In the same proceeding, the Board considered possible extensions of Pan American and Trans World Airlines, Inc. into new European cities. Because "transfer" and possible "issuance" of "certificates" covering foreign air transportation were involved, the entire matter was subject to ultimate determination by the President under Section 801 of the Act. The route extension proposal was governed by Section 401, and the merger proposal was governed by Section 408. Can it be that the lower court is now ruling that the Board could have exempted Pan American and American from the necessity for having a hearing, and could have granted them a further exemption, without hearing, findings or evidence, authorizing the merger, and could have permitted Pan American and TWA to extend their routes into new territory by exemption (thus avoiding "issuance . . . of . . . any certificate" subject to the President's power)? It should be emphasized that Section 408 (b) specifically

prohibits the Board from approving any merger which would result in creating a monopoly. Is it possible that the Board could, by exemption and without hearing—merely on the basis of a "belief"—permit Pan American and American Overseas to merge and operate as a single unit over an extended route even though such action would result in creating a monopoly?

Certainly when Congress entrusted the Board (and the President, in the case of foreign and overseas routes) with complete control of the economic destinies of air carriers and with enforcement of the anti-trust laws in relation to such carriers, it is absurd to suppose that Congress meant the Board to be in a position to act with respect to such important matters simply on the basis of a "belief," and to act, without concurrence of the President, simply by employing the exemption device rather than the certificate procedure.

Moreover, even if it could be supposed, contrary to the entire pattern and history of the Act, that Congress meant to authorize the Board to exempt, without hearing or findings, from all provisions of Title IV of the Act (except the relatively minor provision relating to pilots), it is apparent that such an authorization of arbitrary action by the Board would be an unconstitutional delegation of legislative power, inasmuch as there would be no standards by which the Board's action could be tested in any judicial proceeding or even in common sense. *Panama Refining Company* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495 (1935). In the *Schechter* case, which was a unanimous decision of the Supreme Court, it was concluded that delegation by Congress of the power to certain trade groups and the President "to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion" of trades and industries was unconstitutional. The Court said (295 U. S. 537):

"Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

The Court specifically stated (295 U. S. 538) that it was an unconstitutional delegation of authority to the President to permit him to act on the basis of "a statement of an *opinion* as to the general effect upon the promotion of trade or industry of a scheme of laws" (Italics supplied). If it was unconstitutional for the President to be allowed to act on the basis of an "opinion," surely it would be equally unconstitutional for the Board to be authorized to act on the basis of a "belief."

The following language of Mr. Justice Cardozo, concurring in the *Schechter* case, is significant (295 U. S. 551):

> "This Court has held that the delegation may be unlawful though the act to be performed is definite and single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co.* v. *Ryan, supra* . . . Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them."

Obviously the delegation which would result from the lower court's interpretation of the Board's exemption powers would be subject to precisely the same objections outlined by Mr. Justice Cardozo. Here, as there, the proposed delegation leaves to "the discretion of the delegate" the power to decide "the necessity, time and occasion of performance," and it is "not confined to any single act nor to any class or group of acts identified or described by reference to a standard." As the lower court's opinion concedes (R. 92) the exemption power relates to "nearly all requirements of the Act." In other words, the exemption authorization described in the lower court's opinion au-

thorizes the Board to do everything related to economic regulation of the air transport industry solely on the basis of the Board's "belief" (with the single exception that in the case of pilots' wages and hours the Board must hold a hearing and comply with the statutory criteria). That "is a roving commission to inquire into evils and upon discovery correct them."

Mr. Justice Cardozo further stated (295 U. S. 553):

> "The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer."

Here, too, if the lower court's interpretation of the Act should prevail, anything which Congress could do in the regulation of air transportation "may be done by the [Board] upon the recommendation of [an interested applicant] by calling it [an exemption]. This is delegation running riot."

If it be suggested that there is no unlimited delegation here in view of the fact that certain standards are prescribed in the Act, the answer is that the lower court's opinion would utterly free the Board from complying with those standards. The statute involved in the *Schechter* case actually prescribed standards. The fatal defect there (as would be true here if the lower court's opinion were to prevail) was that the delegate could act on the basis of a mere "opinion," and there was no way that interested parties or a court could ascertain whether the statutory standards had been observed. It is submitted that there is no Constitutional distinction between a statute which authorizes the Board to do anything which it wishes on the basis of a "belief" and a statute which says: "The Board

shall comply with standards a through z, but in its uncontrolled discretion the Board may disregard those standards and act as it wishes on the basis of a 'belief.' "

The lower court's opinion (R. 92) actually points up this difficulty with that court's suggested interpretation of Section 416 (b) (1), as the court admits that "A belief arbitrarily held might not be enough and some proceedings may be necessary." How can it possibly be determined whether the belief is "arbitrarily held" unless the Board is required to make findings and state the evidentiary basis for its "belief"? *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* Certainly the fact that the Board may have had before it some self-serving statements by interested parties, which were not subjected to cross-examination, and were not supported by facts or proof of any kind, does not indicate that the Board's "belief" was not arbitrary. For anything the parties or the court can know, the Board may have completely ignored even the *allegations* which it had before it. But in any case, it is clear that the Board did not consider anything which could be called "evidence," and since the *allegations* were conflicting the Board was forced to make an "arbitrary" choice between believing allegations of Capital and accepting the allegations of Eastern. The choice was necessarily "arbitrary" because the Board had no evidence on which to make the decision.

The Court is respectfully urged to find that Congress did not delegate to the Board power to disregard the regulatory pattern established by Title IV of the Act solely on the basis of the Board's "belief" that the statute should be disregarded, as such a delegation would (1) be contrary to the entire pattern and purpose of the Act, and (2) be unconstitutional.

CONCLUSION

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition annexed hereto, and that, upon review of the decision of the United States Court of Appeals for the District of Columbia Circuit, said decision be reversed, and the cause remanded for further proceedings consistent with the opinion of the Supreme Court.

Respectfully submitted,
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APPENDIX

Applicable Statutory Provisions

CIVIL AERONAUTICS ACT (49 U. S. C. 401 *et seq.*)

Sec. 2

In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Sec. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the tranportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

* * * * *

(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Sec. 416

(b) (1) The Authority, from time to time and to the extent necessary, may * * * exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the

enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

Sec. 1005 (f)

Every order of the Authority shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Sec. 1006 (a)

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * * * *

(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before

the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

ADMINISTRATIVE PROCEDURE ACT (5 U. S. C. 1001 *et seq.*)

Sec. 2.

As used in this Act—

(d) ORDER AND ADJUDICATION.—"Order" means the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

* * * * *

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Sec. 5

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an

officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

Sec. 6

Except as otherwise provided in this Act—

* * * * *

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirm-

ing a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Sec. 7

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 8

In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 10

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including action for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for

a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 567

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 90) is reported at 185 F. 2d 426. The pertinent orders and findings of the Civil Aeronautics Board (R. 85, 88) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1950 (R. 94). Petitioner filed a petition for rehearing on November 7, 1950 (R. 95), which was denied on November 22, 1950 (R. 125). The petition for a writ of

certiorari was filed on February 20, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether this proceeding to challenge the power of the Board to issue original exemption order under Section 416 (b) (1) of the Civil Aeronautics Act without a hearing has become moot in view of the issuance, after a hearing, of an amended certificate which supersedes the exemption orders.

2. If it be determined that the proceeding is not moot, the additional questions presented are:[1]

(a) Whether an exemption application under section 416 (b) (1) of the Civil Aeronautics Act is required to be determined "after opportunity for an agency hearing" so as to make applicable the requirements of sections 5, 7, and 8 of the Administrative Procedure Act.

(b) Whether petitioner has a constitutional right to a hearing on an application for exemption which results in the grant of additional operational rights to its competitor.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act (52 Stat. 973), as amended (49

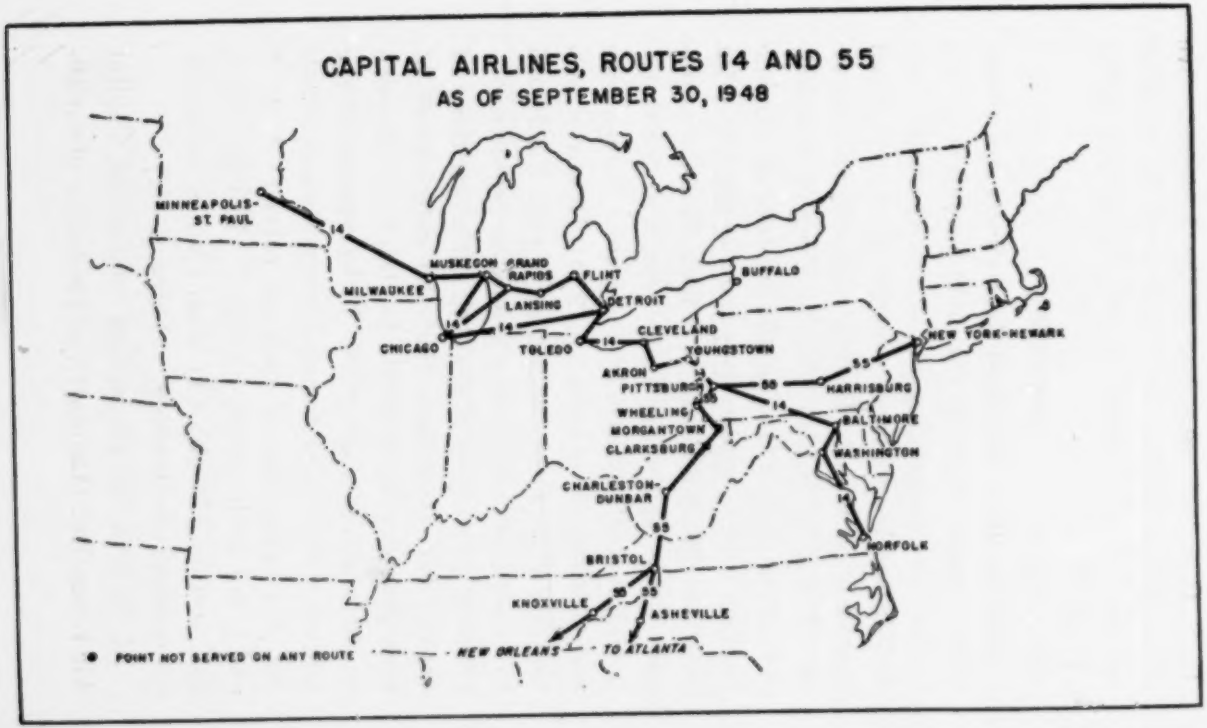
[1] In the event that certiorari is granted, the Board reserves the right to contend that petitioner does not have a "substantial interest" in the challenged orders giving it standing to sue under section 1006 of the Civil Aeronautics Act. Cf. R. 91.

U. S. C. 401 *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) are set forth in the Appendix, *infra*, pp. 24–32.

STATEMENT

Section 401 of the Civil Aeronautics Act (hereinafter referred to as the Act) prohibits an air carrier from engaging in air transportation unless it has been issued a certificate by the Civil Aeronautics Board (Board) authorizing it to do so. Provision is made for the filing of an application for such authority, the conduct of a public hearing on the application, and the issuance of a certificate by the Board if it finds that the applicant is "fit, willing, and able" and that the transportation is "required by the public convenience and necessity." (*Infra*, p. 25.) However, section 416 (b) (1) of the Act authorizes the Board to exempt an air carrier from the requirements of many provisions of the Act, including those of section 401, if it finds that the enforcement of such provision is or would be "an undue burden on such air carrier * * * by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier * * * and is not in the public interest." Unlike section 401, section 416 (b) (1) makes no reference to the conduct of a hearing. (*Infra*, p. 30.)

At the time this proceeding commenced, Capital Air Lines, Inc. (Capital) was the holder of certifi-


CAPITAL AIRLINES, ROUTES 14 AND 55
AS OF SEPTEMBER 30, 1948
MINNEAPOLIS-ST. PAUL
MILWAUKEE
MUSKEGON
GRAND RAPIDS
FLINT
LANSING
DETROIT
CHICAGO
TOLEDO
CLEVELAND
BUFFALO
YOUNGSTOWN
AKRON
PITTSBURGH
NEW YORK-NEWARK
HARRISBURG
WHEELING
MORGANTOWN
CLARKSBURG
BALTIMORE
WASHINGTON
CHARLESTON-DUNBAR
NORFOLK
BRISTOL
KNOXVILLE
ASHEVILLE
NEW ORLEANS
TO ATLANTA
14
55
POINT NOT SERVED ON ANY ROUTE

cates authorizing it, *inter alia,* to engage in air transportation with respect to persons, property, and mail over routes 14 and 55 (see map facing this page), as follows: (1) between Norfolk on the one hand and Minneapolis-St. Paul on the other, via various intermediate points, including Baltimore, Pittsburgh, and Detroit (Route 14); and (2) between New York-Newark on the one hand and New Orleans on the other, via various intermediate points, including Pittsburgh (Route 55) (R. 85). Under these authorizations, Capital could fly cargo planes between Baltimore and Pittsburgh or any other points west thereof on Route 14; and it could also fly cargo planes from New York (Route 55) to points west of Pittsburgh on Route 14, provided the plane made a stop at Pittsburgh, the junction point of Routes 14 and 55. However, it could not carry both cargo originating in New York and destined for Detroit, and cargo originating in Baltimore and destined for Detroit, on the same flight and in the same plane.

On July 29, 1948, Capital filed a verified application with the Board pursuant to section 416 (b) (1) of the Act for "an order exempting Capital from the requirements of the Act and of the regulations issued thereunder insofar as such requirements would otherwise prevent Capital from serving Baltimore (and not serving Pittsburgh) as an intermediate point on Capital's C–54 all-

cargo flights which serve New York-Newark as a coterminal" (R. 20, 20–25). Such an exemption order would permit, for example, Capital to originate a C–54 cargo flight in New York with cargo destined for Detroit, proceed to Baltimore, and pick up additional cargo destined for Detroit, and fly directly to Detroit without stopping at Pittsburgh. Capital asserted that such an exemption order would enable it to save over $11,000 per month in operating expenses and would be in the public interest (R. 24).

The following proceedings were had on Capital's application: On August 19, 1948, petitioner filed a motion that the application be dismissed or set for hearing. The motion presented petitioner's views on the law and disputed Capital's factual allegations (R. 26–38). On August 31, 1948, Capital filed a verified answer to petitioner's motion, replying to the petitioner's arguments and factual allegations (R. 38–42). On September 16, 1948, petitioner filed a reply (R. 42–46). On September 27, 1948, the Board issued its order denying petitioner's motion and granting Capital's exemption (R. 85–87). The Board's order was issued upon its "finding that the present enforcement of the provisions of section 401 (a) of the Act insofar as said section would otherwise prevent applicant from engaging in the air transportation authorized hereby would be an undue burden on applicant by reason of the unusual circumstances affecting its operations and is not

in the public interest" (R. 86). The order provided that the exemption be "effective immediately" and "shall terminate one year from the date of this order" (R. 86, 87).

On November 2, 1948, petitioner filed a verified petition for reconsideration and for a stay of the exemption order, advancing new facts and arguments (R. 46–69). On November 30, 1948, petitioner filed a verified supplement to that petition with additional facts and arguments (R. 69–72). On December 13, 1948, Capital answered the petition for reconsideration as supplemented (R. 72–75). On December 22, 1948, petitioner replied to Capital's answer (R. 75–84). On March 15, 1949, the Board amended its exemption order to eliminate an "ambiguity" and clearly to prohibit Capital from engaging in "local air transportation between New York, N. Y.–Newark, N. J., and Baltimore, Md." (R. 88–89).[2]

Petitioner's petition for judicial review, attacking the validity of the Board's exemption order of September 27, 1948, as amended by its order of March 15, 1949, was filed on May 12, 1949 (R. 1–19). Since that time, the Board has entered sev-

[2] The map facing page 2 of the petition for a writ of certiorari is misleading insofar as it indicates that the cargo operations permitted to Capital by the exemption are the same between New York and Baltimore as over the remaining portions of Route 14. While Capital was authorized by the exemption to fly cargo planes between New York and Baltimore it was prohibited from enplaning cargo in New York and deplaning it at Baltimore, or vice-versa.

eral orders related to this proceeding which, although not fully reflected in the record, are subject to judicial notice (cf. R. 91). On September 26, 1949, the day before Capital's exemption order was to expire by its own terms, the Board adopted an order (Order Serial No. E–3370) granting Capital an exemption in the same terms as the earlier exemption for the period from September 28 to October 27, 1949. On October 24, 1949, the Board adopted a similar exemption order (Order Serial No. E–3467). This exemption was to be for a period of six months if Capital should apply for an amendment to its certificate pursuant to section 401 (h) of the Act within 30 days; otherwise the exemption was to terminate in 30 days. Capital applied for the amendment on November 23, 1949 (R. 91). On April 24, 1950, upon the expiration of the six-month period, the Board adopted an order amending the previous exemption order with respect to the date of its expiration (Order Serial No. E–4099). The amendment provided that the exemption should terminate 60 days after final determination by the Board of Capital's application for an amendment to its certificate.

On February 15, 1951, the Board, acting under Section 401 (h) of the Act and after notice and hearing, adopted an order (Order Serial No. E–5131) directing the issuance of an amended certificate to Capital which embodied authority to operate in the manner authorized by the

earlier exemption orders. The order provided that the amended certificate "shall be effective April 16, 1951" and that the authorization here involved "shall expire on August 11, 1954." Petitioner did not seek review of any of the orders of the Board issued subsequent to March 15, 1949, either by amendment to its petition for judicial review, or otherwise.

ARGUMENT

1. This case has become moot. The orders of the Board challenged in this proceeding expired by their own terms on September 27, 1949 (R. 87, 89, 85). Capital is exercising no authority pursuant to those orders. There is, therefore, no subject matter upon which the judgment of the Court can operate. Less than a month ago, in considering a similar situation, this Court reiterated the governing principle with a quotation from an earlier case, saying:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 115–116, and cases cited; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475–477." *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943).[3]

[3] *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al.* v. *Wisconsin Employment Relations Board*, No. 330, O. T. 1950, decided February 26, 1951.

The court below recognized that it "might dismiss the petition for review as moot" but went on to state (R. 91): "judicial decision of important questions that are likely to recur should not be 'defeated by short-term orders, capable of repetition, yet evading review'. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 515. *Gay Union Corp.* v. *Wallace,* 71 App. D. C. 382, 112 F. 2d 192, *cert. denied,* 310 U. S. 647. Eastern's petition raises one important and recurring question * * * whether exemption proceedings by the Board under § 416 (b) of the Civil Aeronautics Act must conform to the requirements concerning notice, hearing, etc., that are imposed by §§ 5, 7, and 8 of the Administrative Procedure Act * * *" (R. 91). The court of appeals considered that question and answered it in the negative (R. 93).

At the time of the decision below, Capital possessed certain operating authority under the exemption granted it pursuant to section 416 (b) of the Act, and the period during which such authority would be effective was subject to extension by the Board. Since that decision, the Board, after notice and a hearing conducted in accordance with Sections 5, 7, and 8 of the Administrative Procedure Act has entered an order under Section 401 (h) directing the issuance of an amended certificate to Capital granting it the authority previously held by virtue of the exemption orders (*supra,* pp. 8–9). Not only is

that order subject to judicial review, but the effect of its issuance is to preclude the issuance of further exemption orders like those sought to be reviewed. Under these circumstances, the doctrine of the *Southern Pacific Terminal* case, *supra,* is inapplicable and even the single question considered by the court of appeals is now moot.[4] *St. Pierre* v. *United States,* 319 U. S. 41, 42; *Spreckels Sugar Co.* v. *Wickard,* 131 F. 2d 12, 15 (C. A. D. C.).

2. The court below properly decided that the Civil Aeronautics Act does not require that exemption applications be adjudicated "after opportunity for an agency hearing" so as to make applicable the requirements of sections 5, 7, and 8 of the Administrative Procedure Act.

Section 416 (b) (1) of the Act (*infra,* p. 30) authorizes the Board to exempt air carriers from certain provisions of the Act if it finds that the enforcement of the provision is or would be an undue burden and is not in the public interest. The procedure to be followed in granting ex-

[4] There can be no doubt that the question of the adequacy of the Board's findings to support its expired exemption orders, which petitioner argues at length (Pet. Br. 42–52), is moot. Petitioner has not challenged the Board's exemption order of October 24, 1949 (Order Serial No. E–3467), which remains effective until April 16, 1951, or the findings upon which it is based. No practical purpose could be served by remanding the case to the Board for lack of findings when the order in question has expired and the Board has adopted a new order supported by new and more elaborate findings which petitioner has chosen not to challenge.

emptions is not specified.[5] No requirement for a hearing is expressed and none can properly be inferred. On the contrary, a fair reading of the statute shows an unmistakable intention upon the part of the Congress to avoid such a requirement. Throughout the Act, as in other Federal statutes, Congress has provided for Board action "after notice and hearing" only where it has desired to impose such procedural limitations.[6] No such limitations are contained in section 416 (b) (1). While this circumstance alone would seem to be determinative, there is positive evidence that the omission of such requirements from section 416 (b) (1) was not an oversight but was deliberate, for a requirement of "notice and hearing" appears in the following paragraph of the Act as an exception to section 416 (b) (1). The court of appeals re-

[5] Section 1001 of the Act (49 U. S. C. 641) provides that "The Board may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Section 205 (a) of the Act (49 U. S. C. 425 (a)) provides that "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

[6] See, for example, Secs. 401 (c), (h) and (k) (49 U. S. C. 481 (c), (h) and (k)), Secs. 402 (e) and (g) 49 U. S. C. 482 (e) and (g)), Sec. 406 (a) (49 U. S. C. 486 (a)), Sec. 408 (b) (49 U. S. C. 488 (b)), Sec. 411 (49 U. S. C. 491), Sec. 609 (559), Secs. 1002 (c) and (d) (49 U. S. C. 642 (c) and (d)).

ferred to this circumstance as follows: "Whereas 416 (b) (1), without mentioning notice and hearing, authorizes the Board 'except as provided in paragraph (2) of this subsection' to grant exemptions from the requirements of the Act 'if it finds that' their enforcement would be an undue burden, paragraph (2) forbids the Board to grant exemptions from certain requirements of the Act regarding pilots' hours and pay unless it 'finds, after notice and hearing, that' their enforcement would be an undue burden. Congress could hardly have made clearer its intention to authorize the Board to grant, without hearing, exemptions from requirements that do not relate to pilots." (R. 92.)

It is clear, moreover, that to read a hearing requirement into section 416 (b) (1) would frustrate its basic purpose to avoid "undue burden" to carriers if the public interest permits. By that provision, Congress authorized the Board to exempt a carrier from the requirement of section 401 (a) that it have a certificate authorizing the transportation to be performed and from the requirement of section 401 (h) that its certificate be amended only after notice and hearing, upon a finding that the enforcement of such provisions would be an undue burden and not in the public interest. But if the Board were required to impose the delay and other burdens of a full hearing in order to exempt a carrier from such

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burdens, the exemption proceedings would be futile and the purposes of section 416 (b) (1) would be defeated.[7]

Petitioner nevertheless insists that by implication section 416 (b) (1) requires a hearing on exemption applications. It reads this requirement into section 416 (b) (1) on the basis of (1) the provision that before granting an exemption the Board "find" certain things (Pet. Br. 24–28), (2) the general objectives of the Act (Pet. Br. 18–24), and (3) the judicial review provisions of the Act (Pet. Br. 28–31). The arguments advanced are too tenuous and strained to afford a reasoned basis for overriding the intention of Congress plainly expressed in section 416 (b) (1). The Court of Appeals concluded that "The statutory words 'if it finds', in their context, mean

[7] The Court of Appeals for the Seventh Circuit found similar reasoning persuasive in a comparable situation involving the Board's exemption powers under section 1 (2) of the Act (49 U. S. C. 401 (2)). *American Airlines, Inc., et al.* v. *Civil Aeronautics Board*, 178 F. 2d 903. The court held that the Board did not have to find that an indirect air carrier was fit, willing, and able, and that its operations were required by public convenience and necessity in order to exempt such carrier from the requirements of section 401 that, before issuing a certificate, the Board find it fit, willing, and able, and that the transportation authorized was required by public convenience and necessity. In other words, to read the requirements of a provision of the Act from which exemption was sought into the exemption provision "would completely nullify the purpose of Congress as expressed in" the exemption provision (178 F. 2d at 906).

little more than 'if it believes' " (R. 92). Such a view coincides with the frequent Congressional practice of requiring an administrative agency or executive official to make "findings" as a condition precedent to quasi-legislative action, while dispensing with any necessity for formal hearings.[8] Petitioner attacks this normal reading of the statute by suggesting that it would require the substitution of the word "believes" for "finds" throughout the statute (Pet. 47). But "finds," when used in conjunction with a direction to hold a hearing, need not be given the same meaning as when it is used in the absence of such a direction. Not only would the express requirements of the Act to hold hearings be sur-

[8] See *e. g.*, the powers conferred upon the Federal Communications Commission by sections 308 and 309 of the Federal Communications Commission Act, 48 Stat. 1064, 1084, 1085, 47 U. S. C. 308, 309, to grant licenses without hearing upon findings of public convenience and necessity; *Kreuts v. Elting*, 3 F. Supp. 364, 366 (S. D. N. Y.), affirmed, 69 F. 2d 802 (C. A. 2) (Secretary of Treasury not required to hold hearings prior to the making of findings required by the Anti-Dumping Act of 1921); *Louisville & N. R. Co. v. United States*, 10 F. Supp. 185 (D. D. Ill.) (Federal Coordinator of Transportation not required to hold formal hearing prior to prohibiting establishment of through service where written submission of parties considered); *Miller v. United States*, 277 Fed. 95 (S. D. N. Y.), cited with approval in the *Chicago Junction Case*, 264 U. S. 258, 265, relied upon by petitioner (no hearing is required before the Interstate Commerce Commission for the purpose of making the findings required by 49 U. S. C. 20a (2) for approval of the issuance of railroad securities in view of the provisions of section 20a (6) dispensing with the necessity for hearing).

plusage under petitioner's view, but, more important, the authority plainly conferred by section 416 (b) would be seriously impaired.

Nor is it necessary to read a hearing requirement into section 416 (b) (1) in order to preserve the basic objective of the Act which petitioner states "is to create safeguards against wasteful ~~Airways, Inc., and the transfer of the certificates~~ cate requirements of the Act (Pet. Br. 18). Petitioner assumes that the decision of the court below sanctions an "unrestrained power of exemption" (Pet. Br. 24) and suggests that it would permit the Board to establish a new Chicago-Salt Lake City route by exemption without hearing (Pet. Br. 35–36) or that it would have permitted the Board to authorize the acquisition of American Overseas Airlines, Inc., by Pan American World Airways, Inc., and the transfer of the certificates of the former to the latter by exemption without hearing and without reference to the President.[9] But the very decision of the Board quoted by petitioner (*Re Large Irregular Carriers, Exemption Applications,* Order E–4240 *et al.,* decided May 25, 1950, Pet. 7) shows that such is not the case, and this case presents no such issue. The exemption granted to Capital in this case granted no new route authorization but only an operational

[9] See *Trans-World Airlines, Inc.* v. *Civil Aeronautics Board* and *Sparks, et al.* v. *Civil Aeronautics Board,* 184 F. 2d 66 (C. A. 2), certiorari denied March 5, 1951 (No. 429, O. T. 1950).

authorization which authorizes no new service to cargo shippers.[10] "Security of route" is in no way threatened by the exemption granted in this case.

Finally, the broad and general provisions of the Act relating to judicial review (section 1006, *infra*, p. 31) do not suggest the conclusion that the Board's exemption authority may be exercised only after a hearing even though they provide that "Any order" of the Board is subject to review and that the "findings of fact" of the Board are conclusive "if supported by substantial evidence." In *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 106, it was pointed out that—

> This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions

[10] "Thus the effect of the exemption order was to provide that several *existing* certificate authorizations *to engage in air transportation* could be combined and carried out by a single flight (i. e., the order granted an *operational* authorization, but did not confer new authorization to engage in air transportation)." *Capital Airlines, Inc., Exemption Application*, Order Serial No. E–3467, adopted October 24, 1949, mimeo. pp. 5–6. The necessity for flexibility of this kind in cargo operations was discussed by the Board in the *Air Freight Case*, 10 C. A. B. 572, 603 (1949).

> which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review. Examples are set forth by Chief Justice Hughes in *Federal Power Commission* v. *Edison Co.,* 304 U. S. 375, 384. *Cf. Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130.

Certainly if the broad language of Section 1006 does not alone govern the determination of which orders are subject to judicial review, a problem with which it deals, *a fortiori* it can not modify the plain meaning of section 416 (b) (1) so as to require a hearing in exemption proceedings. If the two sections were in irreconcilable conflict, it would seem, in accordance with the *Chicago and Southern* case, that there would be no judicial review of the exemption order under section 1006 (*cf. American Federation of Labor* v. *Labor Board,* 308 U. S. 401, 404) rather than that a hearing requirement be read into section 416 (b) (1). It is unnecessary to decide that question, however, since Section 1006 of the Act, notwithstanding its "substantial evidence" provision, clearly contemplates judicial review of orders of the Board issued without a prior evidentiary hearing. Thus, section 1006 (c) provides that after receipt of a copy of the petition for review from the reviewing court, the Board "shall thereupon certify and file in the court a transcript of

the record, *if any,* upon which the order complained of was entered." [Emphasis supplied.]

3. Petitioner has no constitutional right to a hearing on an application for exemption which results in the grant of additional operational rights to its competitor. There is, therefore, no conflict between the decision below and *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. (Cf. Pet. 10–12.)

Petitioner claims that as a competitor of Capital holding a certificate of public convenience and necessity it had a constitutional right to a hearing on Capital's application, and that, under the *Sung* case, it was entitled to a hearing in accordance with sections 5, 7 and 8 of the Administrative Procedure Act (Pet. Br. 38–42). The court of appeals held that "Even though no Act of Congress requires a hearing, the Administrative Procedure Act must be followed where a hearing is necessary to the protection of constitutional rights. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33" (R. 93). The lower court thus gave full recognition to the decision in the *Sung* case. It went on to decide, however, that petitioner had no constitutional right to protection against damage from competition, so that the doctrine of the *Sung* case "is not pertinent here" (R. 93). Nothing in the *Sung* case holds the contrary. Plainly there is no conflict.

It is equally plain that a hearing is not a constitutional necessity in exemption cases. The

action of the Board in granting exemptions from the certificate requirements of the Act is "legislative or administrative."[11] See *Trans-Pacific Airlines* v. *Hawaiian Airlines,* 174 F. 2d 63, 65 (C. A. 9), quoted by petitioner (Pet. Br. 31–32). Congress is not required to grant existing carriers a hearing before it authorizes the entrance of additional carriers into the air transportation field or authorizes extensions of service by presently certificated carriers, and it was not mandatory upon Congress to impose such a requirement in delegating that power to the Board. *Bowles* v. *Willingham,* 321 U. S. 503, 519–521; *Bi-Metallic Investment Co.* v. *State Board,* 239 U. S. 441; *Pearson* v. *Walling,* 138 F. 2d 655, 660 (C. A. 8), certiorari denied, 321 U. S. 775; *Guiseppi* v. *Walling,* 144 F. 2d 608, 615 (C. A. 2), affirmed, 324 U. S. 244; *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 694 (C. A. 9), certiorari denied, 338 U. S. 860; *cf. Federal Communications Commission* v. *Radio Station WJR,* 337 U. S. 265, 274–277.

The fact that petitioner may suffer some adverse effect from the Board's action does not raise any constitutional issue. Petitioner has not been

[11] "Licensing" is "adjudication" under the Administrative Procedure Act only because that Act says it is; licensing is the classic example of legislative action. See, for example, section 401 (e) of the Act (49 U. S. C. 481 (e)) which makes provision for both "grandfather" carriers and "grandfather" routes (*infra,* pp. 27–29).

granted a monopoly in the area which it serves"[12] and no constitutional right of petitioner's is invaded merely by the authorization of an additional carrier to compete with it. *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Calif.), affirmed, 323 U. S. 668; *Alabama Power Company* v. *Ickes,* 302 U. S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118; *cf. Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Chapman* v. *Sheridan-Wyoming Coal Co.,* 338 U. S. 621.

Petitioner relies on *Frost* v. *Corporation Commission,* 278 U. S. 515, as establishing its constitutional right to a hearing on Capital's exemption application. It says that the *Frost* case held "that where a license is granted under a statutory provision requiring proof of public necessity, that license cannot lawfully be impaired by the grant of a competitive license *without notice and hearing,* and a specific statutory authorization for such a grant without hearing is unconstitutional" (Pet. Br. 39). This is a misconception of the holding of the *Frost* case. The Court there

[12] Section 401 (j) of the Act (49 U. S. C. 481 (j)) provides that "no certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air navigation facility." See *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 475.

held that the distinction drawn by a particular Oklahoma statute between cooperatives, as there defined, and other business organizations was "arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation" (278 U. S. at pp. 524–525), and that the portion of the statute in question "is unconstitutional as contravening the equal protection clause of the Fourteenth Amendment" (278 U. S. at p. 528). See *United States* v. *Rock Royal Co-Operative,* 307 U. S. 533, 563–564. No question of "equal protection" has been or may be raised in this proceeding. *Currin* v. *Wallace,* 306 U. S. 1, 14. Section 416 (b) (1) is applicable equally to all air carriers. Moreover, in *Frost* the invalid portion of the statute was added by amendment after Frost had acquired his rights (278 U. S. at pp. 525–527), whereas petitioner's rights are derived wholly from the Act and were taken subject to the provisions of the Act, one of which (section 416 (b) (1)) expressly authorized the Board in appropriate cases, and without hearing, to exempt other carriers from the necessity of obtaining a certificate.

CONCLUSION

The proceedings sought to be brought before the Court are now moot. In any event, the decision below is correct, and there is no conflict of authority. It is therefore respectfully submit-

ted that the petition for a writ of certiorari should be denied.

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MARCH 1951.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

DECLARATION OF POLICY

SEC. 2. [49 U. S. C. 402] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity;

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

[1] Act of June 23, 1938, 52 Stat. 973, 49 U. S. C. 401 *et seq.*, Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401 *et seq.*

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * * *

CERTIFICATE REQUIRED

SEC. 401. [49 U. S. C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

APPLICATION FOR CERTIFICATE

(b) Application for certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon

such interested persons, as the Board shall by regulation require.

NOTICE OF APPLICATION

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

ISSUANCE OF CERTIFICATE

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform

such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

EXISTING AIR CARRIERS

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Board upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided,* That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior

to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Board shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the Board shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismarck, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christie, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Florida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by ex-

tension from Grand Rapids, Michigan, to Chicago, Illinois.

* * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provisions, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * *

CLASSIFICATION

SEC. 416. [49 U. S. C. 496] (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title

as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Board finds necessary in the public interest.

EXEMPTIONS

(b) (1). The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (l) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any

such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided,* That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

* * * * *

ORDERS OF AUTHORITY SUBJECT TO REVIEW

SEC. 1006. [49 U. S. C. 656] (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition thertofore.

The pertinent provisions of the Administrative Procedure Act[3] are as follows:

SEC. 2. As used in this Act—

* * * * *

(d) *Order and adjudication.*—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and facts de novo in any court; * * *

(a) *Notice.*—* * *

(b) *Procedure.*—* * *

(c) *Separation of functions.*—* * *

(d) *Declaratory orders.*—* * *

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding officers.*—* * *

(b) *Hearing powers.*—* * *

(c) *Evidence.*—* * *

(d) *Record.*—* * *

SEC. 8. In cases in which a hearing is required to be conducted pursuant to section 7—

(a) *Action by Subordinates.*—* * *

(b) *Submittals and decisions.*—* * *

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[3] Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*

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